No. 11,531

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILBUR JOSEPH WILSON,
Appellant,

vs.

INTEROCEAN STEAMSHIP CORPORATION (a corporation), and UNITED STATES OF AMERICA,
Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

FRANK J. HENNESSY,
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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

In this case a libel *in personam* was filed by appellant making claims for damages and for wages, maintenance and cure against respondents under the Public Vessels Act, 46 U.S.C.A., §781; the Suits in Admiralty Act, 46 U.S.C.A. § 742; Public Law 17, 50 U.S.C.A. App. § 1291. (I R. 10.)

On his claim for damages for negligence, appellant dismissed his action as to all respondents save the United States, electing to proceed only against the United States under the Public Vessels Act, and

against the United States, acting through the War Shipping Administration, under the Suits in Admiralty Act for wages, maintenance and cure. (II R. 8.)

The case was heard before the Honorable Louis E. Goodman, Judge of the United States District Court. A decree in accordance with findings of fact and conclusions of law was entered in favor of libelant on his claim for wages and maintenance to September 21, 1945; and in favor of respondent United States on the claim for damages for negligence; libelant's claim for cure was left in abeyance pending action by the United States Marine Hospital. (I R. 42.)

This appeal is prosecuted solely from the judgment for respondent United States on appellant's action for damages based on negligence. (I R. 44.)

STATEMENT OF FACTS.

This case is based upon the alleged negligent operation of a United States Navy launch in which appellant was riding. The launch was operating on the waters of Pearl Harbor on the night of August 1, 1945, during the "brownout" then in force when it struck a line from a hospital ship attached to an unlighted mooring buoy, throwing appellant forward in the launch and causing certain physical injuries.

On the question of the alleged negligent operation of the launch, appellant and his witnesses all testified orally at the trial. Respondent introduced the written

statement of Ensign Joseph Kreplick, of the United States Navy, who was then present and in charge of the launch. (The statement is not copied in the record, but is an exhibit, see II R. 102, and is set forth in full in the appendix to this brief.)

Appellant Wilbur Joseph Wilson testified in substance that he had gone ashore in the afternoon of August 1, 1945, and had returned to the New Fleet Landing about 8:15 p.m. to find transportation back to his ship, the Notre Dame Victory. (II R. 16.) He said it was dark and the town was browned out. (II R. 16, 35.)

In regard to the channel and the way the ships were moored, appellant stated that there was a channel 500 to 600 feet wide, and that the ships were moored to the right of this channel, and parallel to the channel. (II R. 20, 42.) He testified that the channel was lighted, and also the ships and mooring buoys. (II R. 35.)

However, he later stated that he did not know if there was a light on the mooring buoy to which the line in question from the Repose was attached. (II R. 48.) He stated that the hospital ship Repose was the first vessel to the right as the launch left the dock, being some 200 or 300 yards from the dock. (II R. 18, 19.)

On the operation of the launch, appellant testified that the launch was 50 feet in length, that he was seated in the first seat forward, which was a high seat so that he was seated in a somewhat standing

position. (II R. 18.) He stated he saw the Navy coxswain, the helmsman on the launch, and that there were two or three fellows with him, and he was talking to them and not paying any attention where he was going. (II R. 19.) He stated that when the accident occurred (some two or three hundred yards after the launch left dock) the launch was going "wide open," some 17 to 18 knots. (II R. 19, 20.) He stated that the launch veered to the right as soon as it left the dock, and that there was no lookout in the bow of the launch. (II R. 20, 35.) On cross-examination appellant testified he was seated looking forward; and he changed his testimony in regard to speed stated, reducing the speed from 17 or 18 knots to 11 or 12 knots. (II R. 44, 46.)

Appellant called Walter C. Lubinski, who was also aboard the launch when the accident happened. He stated that the channel was 500 to 600 feet wide, that channel buoys were lighted, and the Repose was lighted (II R. 51.) He stated the ships were not moored parallel to each other, but that they were moored some further towards the channel and some further away, so as to aid in maneuvering the ships. (II R. 55.)

He said he was sitting about amidship on a side port, that he observed the coxswain and saw three or four men with him. However, he said nothing about the coxswain talking to these men or that he was failing to pay attention to where he was going. He stated there were four Navy personnel in the crew of the launch and that he did not observe a lookout

at the bow. (II R. 50.) He stated that he merely "presumed" that the launch was going wide open, but that he could not tell. He said the launch headed into the channel, then started to the right and after that he paid no more attention as he could not see over the bow of the launch. (II R. 52.) For this reason he could not see whether the mooring buoy in question was lighted or not. (II R. 54.)

John Edward Dunn, second officer on the Notre Dame Victory, testified for appellant. He stated that the Notre Dame Victory was moored some 2000 yards from the dock and that there were only three lighted channel buoys on each side of the channel for this whole distance. (II R. 73.) He stated that none of the mooring buoys were lighted in Pearl Harbor. (II R. 63.) He said the Naval launches served all the ships in the Harbor and moved in and out of the channel to pick up and discharge passengers.

Dr. Faede, a nose and throat specialist from the Marine Hospital, testified as appellant's medical expert. He stated that he examined appellant on September 13, 1945. At that time he noted the scar on his nose was healed, but somewhat tender, and the doctor made a note that appellant might require an operation in the future to correct a moderate septal deflection. (II R. 95.) On September 13, 1945, he found appellant fit for duty; that the condition of appellant's nose did not interfere with his breathing very much. (II R. 95.) He stated that appellant's condition, a deviated septum, was a common thing to find. (II R. 97.)

The statement of Ensign Joseph Kreplick (Appendix to this Brief) sets out in full his version of the accident. In summary, his statement shows appellant was transported as an accommodation to him; that a blackout was in effect; that he stationed the crew where they would be most effective as lookouts; that they were all looking for anything in the water but could not see the lines because of the blackness; that a searchlight could not be used; that they were travelling at one-third speed.

QUESTION.

Did appellant sustain his burden of proving that the naval launch struck the line due to any negligence in its operation?

ARGUMENT.

I.

WHERE THE TRIAL JUDGE HEARD ALL OF THE WITNESSES SAVE ONE, AND HIS TESTIMONY SUSTAINED THE COURT'S DECREE, AND THE TRIAL JUDGE CLEARLY EXPRESSED HIS OPINION ON THE CREDIBILITY OF THE WITNESSES, THIS COURT, IN AN ADMIRALTY APPEAL, SHOULD GIVE GREAT WEIGHT TO THE TRIAL COURT'S FINDINGS, AND SHOULD NOT REVERSE THE JUDGMENT UNLESS THE FINDINGS ARE CLEARLY ERRONEOUS.

Although the rule persists in admiralty appeals that the Appellate Court will decide the case *de novo,* still, where the trial Court heard oral testimony from the majority of the witnesses, and was therefore in a much more favorable position to test their credi-

bility, the Appellate Court will give due and serious consideration to the findings of fact of the trial Court.

In *Tawada v. U. S.,* No. 11,258, decided June 16, 1947 (9 Cir.), this Court said (p. 3, white advance opinion):

> "In an appeal in admiralty, where 'a substantial part of the evidence was heard in open court', the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness'. Thomas v. Pacific S. S. Lines, Ltd., 84 F. 2d 506, 507-8, CCA 9; The Pennsylvanian, 149 F. 2d 478, 481, CCA 9. And, 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.' (Citing The Ernest H. Meyer, 84 F. 2d 496, 501, CCA 9; cert. den. 299 U. S. 600.)"

In *The Catalina,* 95 F. (2d) 283 (9 Cir.), the Court said (p. 284):

> "While this admiralty appeal is a trial *de novo,* the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. Ernest H. Meyer (9 CCA), 1936 AMC 1179, 84 F. (2d) 496, 501; Silver Line et al. v. United States et al. (9 CCA), decided January 31, 1938, 1938 AMC 521."

In *The S.C.L. No. 9,* 114 F. (2d) 964, the Court stated that in an admiralty appeal the trial Court's

findings, when supported by competent evidence, are entitled to great weight. The Court further stated (p. 966), "This rule appropriately recognizes that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witness' demeanor which the cold print of a record fails to disclose." And, the Court also said, speaking of certain testimony, "being oral, its credibility was for the Court at all times, even though unrefuted."

In this case Judge Goodman stated at length his opinions on the facts and the credibility of the witnesses. (II R. 110, et seq., the substance of the Court's opinion is set forth in the Appendix to this Brief, part II.)

Thus, the Court below stated that he did not accept appellant's testimony that the coxswain and operators of the launch were inattentive, and his was the only testimony to that effect. The Court also stated that he did not accept appellant's testimony that the ships were lined up parallel so that there was a direct channel, and so that any deviation from that marked channel would be dangerous. Judge Goodman accepted the testimony of Mr. Lubinski that the vessels were not moored parallel to one another, but that their positions were staggered to secure maneuverability. (II R. 55.) The Court thus indicated he accepted the testimony of the other witnesses in regard to lighted channel buoys; to the lack of lights on the mooring buoys; to the fact that the launch did not veer sharply to the right while the coxswain was negligently inattentive.

Thus, taking into account the trial Court's opinion and findings on the facts, there is no negligent inattention or failure to keep a proper lookout shown. Appellant has shown that there was a brownout in effect; that it was dark; he has not shown that the line was visible; that the most vigilant lookout could have seen the line; that the lookouts were improperly placed and inattentive; and therefore he has, we submit, proven no negligence.

II.

UNDER ADMIRALTY LAW, APPELLANT HAS NOT SUSTAINED HIS BURDEN OF PROVING NEGLIGENCE ON THE PART OF RESPONDENT.

Appellant argues that negligence on the part of respondent was shown in the inattention of the coxswain, and the failure to have a lookout.

We have already pointed out that the trial Court refused to accept appellant's testimony on the inattention of the coxswain, and since this is appellant's only proof on the subject, we submit this asserted ground of negligence should not be accepted by this Court.

On the question of the alleged failure to maintain a lookout, we wish to point out that this cause of action for negligence is being prosecuted solely under the Public Vessels Act, 46 U.S.C.A. Sec. 781 et seq., which affords a cause of action "for damages caused by a public vessel of the United States" (§ 482), and

thus the burden is placed upon appellant to prove a tortious act on the part of respondent. *American Stevedores v. Porello,* 67 S. Ct. 847; *Canadian Aviator, Ltd., v. U. S.,* 324 U. S. 215, 65 S. Ct. 639.

Under the admiralty law the burden is on the appellant to prove that the launch did not maintain a proper lookout. A case similar to the present in regard to the lookout question is *The Josephine,* 247 Fed. 296 (2 Cir.). There the libelant, the schooner Wooley, struck the claimant, the barge Josephine. It was a dark squally night, and the Josephine was riding at anchor behind a breakwater, without lights, and loaded to a freeboard of probably not over two feet. The mate of the Wooley did not sight the Josephine until she was 25 feet away.

The Court, per L. Hand, J., stated: "The sole questions in this case are *whether the Wooley maintained no proper lookout,* and, if not, whether she has shown beyond reasonable doubt that her failure did not contribute to the collision. *On the first of these questions the claimant has the burden,* on the second the libelant." (Emphasis added.)

The Court (p. 298) continues a discussion of the evidence, stating it was difficult from the record to determine exactly what happened on board the Wooley immediately before the accident. In any event, the Court states that just before the accident the mate (who sighted the Josephine 25 feet away) and the cook were in the foreward part of the ship where their work to bring the ship about and anchor behind

the breakwater was to be done. There was nothing to intercept their attention and the Court further states:

> "Nowhere in the testimony can we find that either the mate or the cook was asked whether they were looking out just before the collision. Under these circumstances it does not seem to us that the claimant has proved her case. There is nothing in the events themselves which suggests a failure to keep a lookout. The night was black and squally, and there is no reason to suppose that the barge, no more than a log lying in the water, would have been made out sooner than she was whether a lookout was kept or not." (p. 289.)

See also *Pierce v. J. R. P. Moore,* 45 Fed. 267 (D. C., N. C.)

Appellant's only evidence regarding the absence of lookouts are the statements of appellant and his shipmate Lubinski that no lookout was standing in the bow. Neither appellant nor Lubinski at any time testified as to the absence of lookouts along the sides of this fifty foot launch, nor to their absence in the forward part of the boat. Appellant was never questioned on absence of lookouts in these parts of the launch, or on their attention or inattention at the time of the accident. (Appellant's statement regarding the absence of a lookout in the bows appears at II R. 35.) Mr. Lubinski was asked if he knew how the accident happened and he stated (II R. 52, 53):

> "Mr. Resner. Q. What course did the launch take to the point of the accident?

> A. The launch headed out in the channel, then it started to go off to the right. From then on I paid no more attention because it is an impossibility for me to see over the bow, anyway. * * * (p. 53.) I paid no attention. I was sitting there talking to a Naval officer. * * *"

Thus Lubinski's testimony adds nothing to the question of whether the lookouts were properly maintained.

In *The Catalina,* 95 F. (2d) 283, at p. 285, (9 Cir.), Judge Denman stated:

> "With regard to the attention of the lookout to his duties, the Ariadne rule (The Ariadne, 13 Wall. 475, 20 L. Ed. 542, 543) requires the highest watchfulness, but this does not alter the burden of proof on the Catalina to establish that it was not exercised by the Arbutus' lookout. *When such proof is made,* certain adverse presumptions may arise as to its causative effect, but the proof of the inattentive watchfulness must come first."

The opinion in *The Catalina* is also pertinent here because it points out most clearly that the admiralty law does not require a lookout to be stationed in the exact bow of the boat. In that case, the vessel whose lookout was questioned was a 77-foot motorboat. The lookout was shown to have stood some 23 feet abaft of the stem, alongside the port forward end of the pilot house. The Court laid down the proper rule, following *The Ottawa,* 3 Wall. 268, 273, 18 L. Ed. 165, 167, and *St. John v. Paine,* 10 How. 557, 585, 13 L. Ed. 537, 550, that the lookout, "must be in 'the

positon best adapted to descry vessels approaching at the earliest moment.' This may not be at, but away from, the extreme bow of such a vessel as the Arbutus * * *'' (p. 285, 95 F. (2d).) See also *The Mamei,* 152 F. (2d) 924, 929 (CCA-3); *Lone Eagle-Crosby,* 126 F. (2d) 914, 1942 AMC 611, 615 (CCA-9).

The ''Navigation Rules for Harbors, Rivers & Inland Waters Generally'' and the ''International Rules for Navigation at Sea'', if we may assume that they apply to naval vessels under these conditions, merely state that a proper lookout must be maintained. (See International Rules, Art. 29, 33 U.S.C.A., § 121; Harbor Rules, Art. 29, 33 U.S.C.A. 221.)

The statement of Ensign Kreplick, officer in charge of the launch (see appendix) shows clearly that the whole crew of the launch were keeping a lookout; that he had placed the crew, including a bowhook, in places on the launch where they would be to the best advantage in this respect, and that they were coasting at one-third speed when the accident happened.

Respondent submits that appellant has clearly failed to sustain his burden of proving that the launch maintained no proper lookout.

III.

THIS IS NOT A CASE WHERE THERE WAS A FAILURE TO MAINTAIN ANY LOOKOUT, THEREFORE APPELLANT'S CASES BASED ON SUCH EVIDENCE ARE NOT IN POINT. BUT, IN ANY EVENT, THE PREPONDERANCE OF THE EVIDENCE FAVORS RESPONDENT.

Appellant argues at length (Opening Brief, pp. 12-17), rules of law regarding the failure to maintain a lookout and the presumptions arising therefrom. As we have shown under Heading II of this brief, appellant has failed to sustain his burden of proving the failure to maintain a proper lookout. The mere statements of appellant and Lubinski that there was no lookout standing in the bow, does not prove that the launch had no lookouts whatsoever. Of course, the statements of Ensign Kreplick that the naval crew were stationed about the launch where they would be to the best advantage, and were keeping a lookout is directly contradictory to appellant's theory. The trial Court, moreover, rejected appellant's statements that the helmsman was inattentive. We have no argument with the rules of law appellant cites, but we earnestly maintain that the facts do not warrant the application of such rules.

Respondent does not, nor does it have to, argue that the wheelsman is a sufficient lookout. Appellant introduced no evidence that the helmsman was the only lookout and respondent's evidence, the statement of Ensign Kreplick, shows there were sufficient lookouts other than the helmsman.

Appellant cites cases showing the duty which a free moving vessel has towards a stationary vessel, where

the facts show that the stationary vessel was clearly visible and properly anchored. See e. g., *The Shinsei Maru* (D. C.) 266 Fed. 548; *The James McWilliams* (N. Y.) 172 Fed. 919. This duty has been held not to apply where the stationary vessel was improperly anchored, *The J. L. Miner,* 260 Fed. 901 (5 Cir.), and therefore no presumption of negligence attached to the moving vessel. We are not arguing that the Repose was negligent, and neither is appellant. His cause of action under the Public Vessels Act is directed solely against the launch (second cause of action of libel, I R 14-16). However, we do believe that under the circumstances of this case where it was dark and good vision was substantially impaired; where blackout regulations necessitated that lights on the mooring buoys and searchlights on the launch could not be used; where the mooring lines were not visible, that the presumption in favor of a stationary vessel should not apply here. Nor should such cases apply here as *The Pavonia,* 26 Fed. 106 (2 Cir.), cited by appellant, and which impute negligence to the lookout where it was a clear, moonlight night, the route of the other ferryboat was well known, there were no obstructions to good vision, and yet the other vessel was not seen.

This is not, moreover, an action between two vessels for damages to the vessels because of collision. The negligent acts which appellant attempted to prove, and which he alleges on this appeal are inattention on the part of the helmsman, and failure to maintain lookouts. The burden of proving such negligence is upon the appellant.

Furthermore, the evidence preponderates against a finding of negligence here. The evidence does not show the lookouts were inattentive. None of appellant's witnesses saw the line. Ensign Kreplick stated the line was not visible; blackout regulations prevented the use of a searchlight. The evidence is undisputed that the mooring buoy was not lighted. Any imputation of fault that may have arisen through striking a stationary object has certainly been eliminated by the evidence in this case. *The Josephine,* supra, 247 Fed. 296; *Pierce v. J. R. P. Moore,* supra, 45 Fed. 267.

Appellant's cases involving the striking of a known object would not, of course, be applicable here. (He cites *The Park City* (D. C.), 144 Fed. 527, *The Sara* (D. C.), 180 Fed. 620.) In this regard see *Southern Bell Tel. & Tel. v. Burke* (5 Cir.), 62 F. (2d) 1015.

Appellant argues that a presumption of fault arises upon the failure to keep a proper lookout. However, as this Court stated in *The Catalina,* supra, and the Second Circuit in *The Josephine,* supra, the opposing side has the burden of proving a lack of proper lookout before such presumption arises, and, we submit, that burden has not been met. Furthermore, even conceding for the sake of argument that such a presumption of fault arises here, that presumption has clearly been dispelled by the evidence. The trial Court rejected testimony that the helmsman was negligently inattentive to his course or duties. Appellant offered no evidence as to what the rest of the launch's crew were doing, unless it can be inferred from appellant's

testimony that the crew and officer were all standing around the helmsman talking. Such an inference was not accepted by the trial Court who had the best opportunity for testing the witness' credibility. In direct contrast to such testimony is Ensign Kreplick's statement in regard to lookouts, one-third speed, blackout conditions and the unprecedented length of the mooring line; Second Officer Dunn's testimony in regard to the few lighted channel buoys; the unlighted mooring buoys, and the necessity for the launches to ply in and out of the moored vessels; and the testimony of Mr. Lubinski that the vessels were not moored parallel, but were in staggered positions.

Furthermore, since the whole evidence is that the line was invisible, the rule of *The Blue Jacket v. Tacoma Mill Co.,* 144 U. S. 371, 12 S. Ct. 711, 718, would seem to apply:

> "It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision."

See also

The Nacoochee, 137 U. S. 330, 11 S. Ct. 122, 125;

The Eagle (9 Cir.), 289 Fed. 661.

IV.

THE FACTS BRING THIS CASE WITHIN THE DOCTRINE OF INEVITABLE ACCIDENT.

Although the trial Court, we believe, decided this case primarily on the ground that appellant had not sustained his burden of proving negligence on the part of respondent, we submit that the doctrine of inevitable accident is fully applicable to the facts of this case and exonerates respondent from liability.

In *Wright & Cobb Lighterage Co. v. New England N. Co.* (D. C., N. Y.), 189 Fed. 809, affirmed (2 Cir.) 204 Fed. 762, the Court held that a ferry operating in a dense fog so that other vessels could be seen but a very short distance was not negligent for striking a carfloat where she maintained proper lookouts, was proceeding slowly and carefully, but could not hear the tug and float until too late to avoid collision.

Judge Hough, in *The Anna C. Minch,* 271 Fed. 192 (2 Cir.), stated that "the word 'inevitable' must be considered as a relative term, and construed, not absolutely, but reasonably with regard to the circumstances of each particular case." (p. 194.) See also *Adams v. Carey* (Md.), 1937 AMC 675, 190 Atl. 815. It is true that to come within the rule of inevitable accident the vessel must show that due care and caution and proper nautical skill were used. *Wright & Cobb Lighterage Co. v. New England N. Co.,* supra; *The Anna C. Minch,* supra; and see *The Fullerton,* 211 Fed. 833 (9 Cir.) where a more stringent burden was placed upon the vessel asserting inevitable accident, since it well knew the position

of the vessel which it struck in the fog. We believe, however, that the preponderance of the evidence shows that those in charge of the launch were doing all in their power to avoid striking any vessel or obstruction. The statement of Ensign Kreplick asserts that the launch had a "bowhook"; that he and the crew were keeping a lookout ahead; that the launch was moving slowly at one-third speed; that the mooring lines were not visible; that this line was exceptionally long.

The trial judge did not accept appellant's testimony that the coxswain was negligently inattentive to his duties, or that the channel was straight and clearly marked. The evidence showed that the channel had only three lighted channel buoys on each side of the channel for a distance of over a mile; that the vessels were not moored parallel, but in staggered positions; that the mooring buoys were not lighted; that it was necessary for these launches to go in and out of the channel to get to the various vessels; and, of course, that the night was dark and a "brown out" was in effect.

We submit that the preponderance of the evidence shows the accident was inevitable after proper precautions and care by respondent and thus that respondent is not liable for negligence.

CONCLUSION.

Respondent submits that appellant has failed to sustain his burden of proving that the Navy launch failed to maintain a proper lookout, or that the helmsman was negligently inattentive to his duties, evidence which appellant clearly must prove to sustain a decree in his favor. Furthermore, the preponderance of the evidence is against a finding of negligence on the part of respondent.

The rule of inevitable accident is clearly applicable here, and this doctrine alone is sufficient to support a decree for respondent.

We respectfully submit that the decree of the trial Court, based upon a clear sufficiency of the evidence, should be affirmed.

Dated, San Francisco,
July 21, 1947.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

PART I.

STATEMENT OF JOSEPH KREPLICK, 17 HANOVER CIRCLE, LYNN, MASS. (INTRODUCED IN EVIDENCE, II R. 102.)

On the night of 1 August 1945 I was first division officer on the U.S.S. Chiwawa which was anchored in Pearl Harbor. I went ashore to do an errand in one of the ship's launches and by the time we were ready to return to the ship, the sun had already set. When I returned to the launch to go back to my ship there were three merchant seamen from the Notre Dame Victory on the dock next to the boat and they had asked the coxswain if it was all right for them to go back in our boat. I was acting boat officer at the time, since no other officers were present in the boat. Their ship was approximately three hundred yards to the port side of our ship and nearer the beach. The coxswain asked me if it would be all right to take the merchantmen back to their ship. Since the merchant ships had no boat schedule, it was customary for the Navy boats to take the merchant seamen back to their ships if it was convenient. I therefore said it would be permissible. The three merchantmen got into the boat, so we cast off. I was not under orders to take these men, but as stated above, it was customary and the coxswain asked me, so I said OK.

To answer the questions specifically:

Paragraph 1. Joseph Kreplick (Ensign, U.S.N.R.) 386501; 10 December 1944 to 15 January 1946; first division officer.

Paragraph 2. It was after sunset and extremely dark. There are mountains all about the bay that cut out the light so it gets dark pretty fast. It was practically pitch black. No lights were showing. Blackout regulations were in force and we could not use a searchlight to see where we were going. We were moving along at less than one-third speed, just barely moving along, groping our way. We were going at the same speed, just coasting along, when the accident happened, which, I would say, was about 1930. The whole crew was looking for anything in the water, but did not see the mooring line because of the blackness, in fact, could not see any mooring lines.

Paragraph 3. The three merchantmen were sitting in the forward part of the launch facing aft when the accident occurred, to the best of my knowledge. Because of the danger of navigation in the blackout, I was watching the water ahead. The stern line of the Repose that we hit was secured to a buoy and the buoy, I should say, was about 40 yards from the Repose, an unusually long distance. We could see the Repose but did not expect its mooring lines to extend out so far. The line sagged so that it just skimmed the water where we hit. Neither the bowhook, the coxswain nor I saw the line until we hit it. When we hit the line, there was no sudden jolt since the line had some slack in it and it was not until a few seconds later the slack was gone and the boat stopped dead in the water, at which time Wilson must have fallen forward. The initial shock was taken up in

the slack, so that the final jolt was very slight. The only effect of the jolt was what happened to Wilson, nothing happened to the boat or to any of the other personnel on board. I immediately asked, "Is everyone all right?" I noticed a fellow on the deck and I jumped down. By the time I got there he had risen and felt of his nose and noticed blood on his hands. I ordered the coxswain to make a landing to the Repose gangway. Wilson boarded the Repose under his own power and walked up the gangway. I asked the officer on the deck on the hospital ship if the duty doctor would take care of a man who hurt himself and he immediately called for the duty doctor over the PA system. By this time Wilson had already reached the quarter deck. We stayed along side about five minutes, at which time I asked the officer of the deck how Wilson was and if we should remain to take him back to his ship. The officer of the deck said Wilson was all right and would be taken back to his ship. Wilson was conscious at all times so far as I know. As a matter of fact the gangway to the Repose, which was riding very high in the water, was steep and although I had one of the other merchant seamen go up with Wilson, he did not require any assistance. The only wound I saw on Wilson was toward the end of his nose. It looked as if the cut was deep enough to require stitching to put the nose back in shape.

Paragraph 4. The only one whose name I remember is the coxswain. I do not remember who the other boat crew members were. The coxswain may

know who the bowhook was as he was from his division. The coxswain asked me if he should report the accident to the officer of the deck and I decided since the officer of the deck of the hospital ship said they would take care of everything and since he was not personnel from my ship, I did not feel it necessary to report it, and no report was made.

Paragraph 5. There were no particular ship's regulations, outside of the customary boat safety rules. When I got on the boat at the fleet landing I placed the crew members where they would be to the best advantage. I told the merchant seamen to sit down where they were in the front of the boat, which they did, and once we got underway I told the coxswain we would go back all the way very slow. When we got under way, I concentrated on the navigation of the boat and did not look at the merchant men again after I noticed they were sitting in the front of the boat facing aft, until the accident happened. Since I was the officer present, I saw that everyone was sitting as safely as possible, but I could not state whether at the time of the accident Wilson adhered to my orders. To the best of my knowledge, Wilson did not violate any of my orders.

Paragraph 6. No orders were issued to me by the Shore Patrol or by the officer of the deck or any source relative to transporting merchant seamen to and from their ship. No specific orders were ever promulgated. It was an unofficial policy of the ship to pick up merchant men and bring them back to their ships when it did not inconvenience us. The

merchant men requested the coxswain for permission, who in turn asked me. We did not volunteer.

As I was not watching the merchant men, I cannot say whether or not Wilson wantonly exposed himself to danger.

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29 July 1946.

Then personally appeared Joseph Kreplick and made oath that the foregoing is true to the best of his knowledge and belief.

Before me,

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Notary Public.

PART II.

OPINION OF THE TRIAL COURT. (II R. 110 ET SEQ.)

The Court. As it now stands, his nose bothers him and I think this man should have every opportunity to have it cured. That is why I will make the decree without any prejudice in that respect. The question of negligence, though, Mr. Resner, presents a different question. The ordinary seaman in the maritime service, of course, has known to him certain recognized obligations today which all judges recognize, and about which there can't be very much question. However, this accident occurred while we were still at war, although the war shortly came to an end, and during a condition while Honolulu was not completely blacked out, but still had what they called a brownout. The evidence was to that effect. The boat, which was a Government launch, was taking these men back to their merchant ship. It was the only way they could get back to the ship. It was during that, in the course of performing other duties, in that connection, and having naval vessels stationed there. While ordinarily the courts do not require an over-abundance of evidence to maintain the burden of proof that rests on the libelant, there must be some evidence as reasonably persuasive to justify the award, and every doubt should be resolved in favor of the seaman under those conditions. But here, I don't find in the evidence sufficient to fasten liability upon the United States. If I were to believe that there was a deliberate inattention on the part of those who were operating the launch, that might be sufficient, but I am not per-

suaded by that testimony of the libelant, and without that testimony there isn't enough in the record to justify a finding of negligence on the part of the United States in this instance. I don't think, without testimony, that the operators of the boat would deliberately turn their heads away from their course and would deliberately be inattentive to their work, as I say, without that testimony I don't think the evidence would be sufficient to hold the Government responsible for negligence here, and, frankly, I don't feel I should accept that testimony. That testimony has a familiarity earmark to it. I am not going to accept it, at least sufficient as the basis for an award. As I say, Mr. Resner, I don't think there is enough in the record of any substantial material to justify a finding of negligence.

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The Court. He has a right to expect that the boat will be operated reasonably prudently under all of the circumstances, so as to avoid danger and injury to those on board the boat.

Mr. Resner. What possible explanation can be given for running into a line, your Honor?

The Court. The fact that these were wartime conditions; that the launch was performing duties, taking men to war vessels, as well as to the merchant ships, and that they unfortunately ran into this line that may not have been observable at all under the conditions in following the course to bring the men to their various ships.

Mr. Resner. There was a clearly defined channel. War conditions don't justify the failure.

The Court. The evidence was not clear and convincing that there was a channel. One of the other witnesses, and I forget which one it was, because it has been several weeks since the first hearing on this case, explained that more fully. The boats were not lined up, according to his testimony, so that there was a direct channel out, but, rather they were set back. A boat would go out and swing in to go to a vessel. On the strength of the original statement of the channel, I am not going to make a finding that there was a channel there that was definitely marked out, delineating a channel, so that any departure from it would be an action that would subject those in the boat to danger, because I don't think the evidence warrants that sort of thing. I think it was the second mate who described more clearly the way these boats were moored there, and if you had a case where you had a line marked out and that was the channel, and any deviation from it might be dangerous, the fact that the boat put off to the right would be very strong evidence in your favor. I don't think the evidence sustains that. If you are in any doubt about that, or about the evidence in the case, you will have the testimony written up.

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The Court. I think that you are confused about one thing, Mr. Resner, in your enthusiasm for the cause of this libelant, and he did have a rather severe injury, but you forget that the judge has to decide the case on the facts before him. Just because you put the libelant on the stand and he says the operators

of the boat weren't paying any attention, I don't have to accept that testimony, and just because one witness takes the stand and he says there was a clearly marked-out channel, I don't have to accept that testimony.

Mr. Resner. But there is nothing in rebuttal.

The Court. I have just explained to you there was another witness who takes an entirely different situation with reference to this channel. I am not laying down academic decisions. I am going to decide the cases before me on the facts. I don't think the evidence is sufficient in this particular case.